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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 96

ORLANDO DAILY NEWSPAPERS, INC., et al.,
*Petitioners,*

vs.

MELVIN M. BELLI,
*Respondent.*

**Response to Petition for Writ of Certiorari**

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**Response to Petition for Writ of Certiorari**

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## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, MELVIN M. BELLI, plaintiff below, files this his Response to the Petition for Writ of Certiorari filed by the ORLANDO DAILY NEWSPAPERS, INC., MARTIN ANDERSEN, JEAN YOTHERS, and LEON HANDLEY (hereinafter Petitioners).

## PREFACE

The following symbols will be used:

PW — Petition for Writ of Certiorari
PA — Petitioners' Appendix
R — Record

*All emphasis will be ours unless otherwise indicated.*

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed by petitioners is presently reported at 389 F. 2d 579 (5th Circuit, 1968).

## STATEMENT OF THE CASE

Respondent accepts petitioners' Statement of the Case except for certain significant additions. Paragraph 2 at page 4 of the Petition should contain this finding by the trial court (PA 18; R 64):

> This Court holds that the complaint does not allege libel per se of the plaintiff in either his personal or professional capacity. The article, as alleged in Count I of the complaint, did not, by the application of the "common mind test", subject the plaintiff to "hatred, distrust, ridicule, comtempt or disgrace . . ." *Adams v. News-Journal Corp.*, supra, at 551.

Paragraph 3 at page 4 of the Petition omitted these specific rulings by the Fifth Circuit Court of Appeals:

1. The statement specifying the error of the trial court (PA 23; 389 F. 2d. at 581):

> The Court relied on the erroneous assumption that the determination whether a statement is a libel (or slander) per se is solely for the court.

2. The statement of the controlling law (PA 27; 389 F. 2d at 583):

> We find that the general law and Florida law are in agreement with Dean Prosser's conclusion: "It is for the court *in the first instance* to determine whether the words are reasonably capable of a particular interpretation, or whether they are necessarily so; it is then for the jury to say whether they were in fact understood as defamatory. If the language used is open to two meanings . . . it is for the jury to determine whether the defamatory sense was the one conveyed. (Emphasis by the Court)

3. Statements as to the nature of the publication.

Two of the judges of the Fifth Circuit Court of Appeals were of the opinion that the defendants made a case — "just barely" — for the view that the article was non-defamatory.[1] The same two judges also stated (PA 32; 389 F. 2d at 585):

> The Court has very little doubt that it carries a defamatory meaning. The Court has concluded however that the final determination of the issue of defamation should be made by a jury.

The third judge, specially concurring, was unequivocal in his opinion that the language was clearly capable of only a defamatory meaning:

> I fail to see any way in which reasonable men could construe the statements, oral and written,

[1] "The defendants make a case — just barely — for the view that the article is capable of being reasonably interpreted as non-defamatory. But since the article on its face is also capable of carrying a defamatory meaning, it is for the jury to decide whether the words were in fact so understood. (PA 30), Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 at 584.

in this case in a nondefamatory sense, and would therefore hold them defamatory as a matter of law. The expressed doubt of the majority whether the newspaper statements could carry a nondefamatory meaning is but little less firm than my view.[2] (PA 40)

## REASONS FOR DENYING THE WRIT

1. *The decision of the Fifth Circuit Court of Appeals is not in conflict with the constitutional standard as set forth by this Court in Curtis Publishing Co. v. Butts,* 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) *and by the 8th Circuit Court of Appeals in Pauling v. Globe-Democrat* Publishing Co., 362 F. 2d 188 (1966).

Petitioners frame the question presented (PW 2):

> Whether defendants, in a libel action filed by a public figure, must show that the alleged defamatory matter is directed towards the plaintiff's public conduct in order to avail themselves of the *New York Times* privilege.

*New York Times* and its progeny clearly answer that question to conclusion. For example, in *Curtis Publishing Co. v. Butts, supra,* Mr. Justice Harlan begins the opinion of the Court (PA 45) by summarizing *New York Times:*

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[2]389 F2d at 589. Judge Godbold would have decided the defamatory nature of the publication as a matter of law, reasoning: "The role of the jury is not to be excised. Nor is that of judges. If the content of language is defamatory beyond cavil, freedom does not call for allowing the defamer to make a second attack on the victim's reputation, though done in a judicial atmosphere, on the theory of showing that to the common mind the victim has not suffered in esteem. Judges deal regularly with questions of what ordinary and reasonable people do and think, in the field of constitutional liberties as well as elsewhere, and the properly exercisable judicial role is not diminished on the ground that reputation is what is injured." 389 F. 2d 579 at 589.

> In *New York Times Co. v. Sullivan*, 376 US 254, 279-280, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 95 ALR 2d 1412, this Court held that "[t]he constitutional guarantees* [of freedom of speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood *relating to his official conduct* unless he proves that the statement was made with 'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Mr. Chief Justice Warren similarly began his separate opinion concurring in the result (PA 75)[3]:

> In the New York Times case, we held that a state cannot, consistently with the First and Fourteenth Amendment, award damages to a "public official" for a defamatory falsehood *relating to his official conduct* unless the verdict is based on proof of "actual malice"—that is, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

In extending the qualified privilege for false defamation to a "public figure", this Court did not broaden the immunity from liability for false defamation beyond that spelled out in *New York Times*. Certainly, this Court does not discriminate against a "public figure" by giving him less recourse for a false defamation than that given to a "public official" as petitioners speciously urge. No opinion of this Court has ever afforded the press immunity to pub-

[3]Curtis Publishing Co. v. Butts, 388 U.S. 130, 162; 18 L. Ed. 2 1094, 1115; 87 S. Ct. 1975.

lish false statements of fact concerning a "public official" —or a "public figure"—where the false statements were irrelevant or unconnected with areas of legitimate public interest or concern.

The very language petitioners here complain of, alleging conflict with *Butts, supra,* was taken verbatim from Chief Justice Warren's opinion in that very same case: (PA 76)[4]

> ***Under any reasoning, General Walker was a public man in whose *public conduct* society and the press had a legitimate and substantial interest.

Even in those cases giving the press and the public an absolute privilege, such as during the course of judicial, legislative or administrative proceedings, it is almost universally held that the publication must be connected with, or relevant or material to, the cause in hand or subject of inquiry. In the early case of *Myers v. Hodges*,[5] establishing the absolute privilege for defamatory words during the course of judicial procedure for the first time in Florida, the Florida Supreme Court, considering and relying on 44 cases from practically every jurisdiction in the United States, held:

> In the United States, according to the overwhelming weight of authority, in order that defamatory words, published by parties, counsel, or witnesses in the due course of a judicial procedure, may be absolutely privileged, they must be

[4] *Id.* at 18 L. Ed. 2d 1117).
[5] (1907) 53 Fla. 197, 44 So. 357.

> connected with, or relevant or material to, the cause in hand or subject of inquiry. If they be so published and are so relevant or pertinent to the subject of inquiry, no action will lie therefor, however false or malicious they may in fact be. (Citations omitted)

Implicit, if not express, in every opinion of this Court concerning First Amendment rights is the necessity that privileged defamatory falsehoods pertain to some area of legitimate substantial public interest and concern. Petitioners' first reason urged for granting the writ is without basis.

**2. The question presented by the Petition, supra, (PW 2) is not of crucial concern and importance to the protection of the First Amendment freedoms.**

Despite this Court's adamant refusal to abandon *New York Times* and its offspring and give the press an absolute "unconditional right to say what one pleases about public affairs",[6] petitioners urge this Court to give the press an absolute license to publish a malicious, false and defamatory article concerning Respondent Belli about an event that occurred nine years prior and totally unrelated to any legitimate public discussion, public concern, public interest or public affair. Like *Butts*, the article *sub judice* was not "hot news",[7] and unlike *Walker* was not "news

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[6]Justice Black joined by Justice Douglas concurring and dissenting in *Rosenblatt v. Baer*, 383 U.S. at 94, 15 L. Ed. 2d at 610, 86 S.Ct. 669. In *New York Times Co. v. Sullivan*, 276 U.S. at 293, 11 L. Ed. 2 at 716. Justice Black, joined by Justice Douglas phrased their minority view "that the defendants had an absolute, conditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery Agencies and officials." Also see *Curtis Publishing Co. v. Butts* (PA 83-84) 18 L. Ed. 2d at 1120.

[7]In *Curtis Publishing Co. v. Butts, supra*, the Court noted: "The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges."

which required immediate dissemination".[8] Even Messrs. Justices Black and Douglas, who consistently and eloquently urge this Court to broaden the *New York Times* privilege from qualified to absolute, have not advocated such unequal protection of the law in favor of the press.

Chief Justice Warren tersely concluded his opinion in *Butts, supra*, with the obvious reason why this Court has steadfastly refused to go as far as the press would like (PA 81):[9]

> Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers. *Butts, supra.*

The opinion of the Court in *Butts* makes clear that our case revolves upon "consideration of the factors which arise in the particular context". (PA 59), 18 L. ed. 2d 1107.

Petitioners are in error when they state that the "facts and circumstances surrounding this case seem to lie somewhat between those of *Butts* and Walker (PW 7). We respectfully submit that the facts and circumstances between those *sub judice* and those of *Butts* and Walker are disparate.

**3. The decision of the Fifth Circuit Court of Appeals is in accord with New York Times and its progeny.**

Patent from the Fifth Circuit Court opinion is its careful consideration, not only of *New York Times* but of *Butts, supra, Garrison v. Louisiana* (1964) 379 U.S. 64,

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[8] *Id.* at page 1113.
[9] Id. at p. 1120.

85 S.Ct. 209, 13 L. ed. 2d 125; *Rosenblatt v. Baer*, (1966) 383 U.S. 75, 86 S.Ct. 669, 15 L. Ed. 2d 597, as well as *Pauling v. Globe-Democrat Publishing Co.*, (8th Circuit, 1966) 362 App. 2d 188, and many other lower Federal Court decisions (PA 36-38) 389 F. 2d 579.

Petitioners' Point 3 (PW 7-9) is a mere rehash of their argument under Point 1 (PW 5-6) and we will not burden this Court with further rebuttal except to refer back to our discussion on pages 3-5, *supra*, and to point again to the *Butts* opinion, wherein Chief Justice Warren, adhering to the *New York Times* standard stated (PA 75):[10]

> More significantly, however, the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on *matters of legitimate interest.* Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.

Respondent respectfully submits that if a Court is capable of deciding whether a named individual is a "public figure" within the *Butts* rule, that same Court, *given proper standards*,[11] is just as capable of determining whether the alleged defamation concerns a matter in which the public has a legitimate concern or interest.

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[10]Id. at 1117.

[11]As urged by respondent, *infra*, p. 10.

For the reasons and upon the authorities stated above, respondent opposes the granting of the writ on the question presented by the petitioners (PW 2, *supra*, page 3). We think the Court should take jurisdiction of this cause and grant certiorari for other reasons presented by the Record.

## REASONS FOR GRANTING THE WRIT

Considering that the complaint was filed almost 4 years ago—13 August 1964—and the cause is not yet at issue, in a desire to avoid the tribulations of another plaintiff as described by Mr. Justice Fortas in his dissent in *Time, Inc. v. Hill*,[12] respondent Belli asks this Court to grant the writ for other reasons and clarify the law on at least one question that has not yet been passed upon by this Court:

> WHAT CONSTITUTES CONDUCT OF A PUBLIC FIGURE IN WHICH SOCIETY AND THE PRESS HAVE A LEGITIMATE AND SUBSTANTIAL PUBLIC INTEREST?

If past is prologue, the same "insuperable obstacles" await plaintiff Belli that plaintiff Hill endured in *Time, Inc. v. Hill*, unless this Court (as it did in *New York Times* on the issue of actual malice) dispenses with the niceties and settles certain issues as a matter of law. With due diffidence, respondent suggests that the polarized divergence of the judicial interpretations placed upon one article by four Federal Judges exemplifies the quagmire Mr.

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[12]385 US 374 at 411, 17 L. Ed. 2d 456 at 480.

***But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact.

Justice Black warned against in his clarion dissent in *Butts*, (PA 84):[13]

> It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obsenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings.

The trial judge adjudicated that the article did not "subject the plaintiff to 'hatred, distrust, ridicule, contempt or disgrace . . .'" (PA 18) and dismissed the complaint because the publication was not libel per se. Circuit Judge Godbold, specially concurring, "failed[ed] to see any way in which reasonable men could construe the statements, oral and written, in this case in a nondefamatory sense and would therefore [have held them] defamatory as a matter of law." (PA 40).[14] Circuit Judge Wisdom, joined by District Judge MacRae, held *vel non* the article was defamatory was a question for the jury, stating "The Court has some doubt whether the publication in question carries a non-defamatory meaning. The Court has very little doubt that it carries a defamatory meaning." (PA 32);[15] but "The defendants ma[d]e a case — just barely—for the view that the article is capable of being reasonably interpreted as non-defamatory." (PA 30)[16]

Unless this Court grants its gracious writ and establishes guideposts for the trial court to determine what constitutes that "public conduct" in which society and the

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[13]*Curtis Publishing Co. v. Butts*, 388 US at 171, 18 L. Ed. 2d at 1120.
[14]389 F. 2d 589.
[15]389 F. 2d 585.
[16]Id. at 584.

press have a legitimate and substantial interest, the eventual trial of this case has the prospect of bedlam.

Respondent respectfully prays that this Court grant its writ of certiorari and answer the following questions:

1. WHAT CONSTITUTES CONDUCT OF A "PUBLIC FIGURE" IN WHICH SOCIETY AND THE PRESS HAVE A LEGITIMATE AND SUBSTANTIAL INTEREST?

and

2. WHETHER THE PUBLICATION *SUB JUDICE* IS CAPABLE OF A NONDEFAMATORY MEANING?

For the reasons and upon the authorities cited herein, respondent respectfully prays that this Court deny the writ for the reasons suggested by petitioners and grant the writ for the reasons urged by respondent.

Respectfully submitted,

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By_____
PAUL A. LOUIS

_____
BERTHA CLAIRE LEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response in Opposition to Petition for Writ of Certiorari was furnished by mail this _____ June 1968 to William Y. Akerman, Esquire, 506 First National Bank Building, Orlando, Florida, 32802, counsel for petitioners.

PAUL A. LOUIS